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In The

Supreme Court of the United States

October Term, 1997

RACHEL BAUCHMAN,

Petitioner,

v.

WEST HIGH SCHOOL, *et al.*,

Respondents.

On Petition For A Writ Of Certiorari
To The Tenth Circuit Court Of Appeals

BRIEF OF UNITARIAN UNIVERSALIST ASSOCIATION, ET AL. AS *AMICI CURIAE* IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI BY PETITIONER RACHEL BAUCHMAN

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STATEMENT OF INTEREST OF AMICI CURIAE

Amici curiae,[1] the Unitarian Universalist Association, the American Humanist Association, Americans for Religious Liberty, the Council for Secular Humanism, the Freedom to Learn Network, the American Ethical Union, the American Association of University Women, and Americans for Democratic Action are religious institutions and civic and educational organizations dedicated to preserving the strict separation of church and state. Each *amicus* strongly endorses the idea that the separation of church and state is particularly important in our public schools, which should be preserved as neutral havens for secular education. *Amici* are submitting this brief because the Tenth Circuit decision will leave public schools susceptible to the risk of sectarian strife, subject students to religious proselytization in the classroom and substantially erode the wall of separation between church and state. Each *amicus* has filed a separate statement of interest attached in the appendix to this brief. Letters of consent for the submission of this brief are filed herewith.

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[1] Counsel for *amici curiae* authored this brief in its entirety. No one other than *amici curiae*, their members, or their counsel made a monetary contribution to the preparation or submission of this brief.

SUMMARY OF ARGUMENT

Rachel Bauchman's petition for a writ of a certiorari involves a constitutional question which has serious ramifications for the preservation of the fundamental principle of separation of church and state. In affirming the dismissal of Bauchman's Complaint by the district court, the Tenth Circuit adopted standards of proof and pleading for Establishment Clause claims which conflict with the decisions of this Court and which impose unprecedented burdens on Establishment Clause claimants.

This narrowing of Establishment Clause jurisprudence is particularly important in the context of the public schools, where there are heightened concerns about the effect of religious advocacy on impressionable school children. The new standards adopted by the Tenth Circuit deprive public school students of a fair opportunity to prove that a school policy or practice is motivated by a purpose to advance religion since the standards exclude from the court's review all historical and circumstantial evidence of intent. Such pleading standards are well beyond the notice pleading requirements of the Federal Rules of Civil Procedure.

Consequently, public school students in the Tenth Circuit seeking to challenge religious proselytizing in the schools will be subject to special burdens in bringing their case to trial. Short of an express and contemporaneous admission of culpability by a school official, they will not be able to do so. *Amici* believe that, allowed to stand, the decision leaves public school classrooms subject to

the sectarian control of teachers and poses a threat to the proper adjudication of Establishment Clause cases.

STATEMENT OF THE CASE

At the time that this action was commenced, petitioner Rachel Bauchman ("Bauchman") was a public high school student at the West High School in Salt Lake City, Utah and a member of the West High School Choir ("Choir"). In her original and Amended Complaints, Bauchman alleged that the choir director, Mr. Torgerson ("Torgerson"), with the knowledge and consent of West High School officials, routinely used the West High School Choir as an instrument to promote his own religious views, proselytized students during class time, and coerced choir members into participating in religious activities as a part of their mandatory choir class requirements in violation of the Establishment Clause of the First Amendment.

Bauchman's Amended Complaint, and the evidence presented from the strictly circumscribed discovery allowed by the district court, document a nearly two-decade long history of Torgerson's classroom advocacy of his religious beliefs. As early as 1977, Torgerson, then the director of the South High School Choir in Salt Lake City, began his practice of arranging for the public school choir to perform at worship services for the Church of Jesus Christ of Latter Day Saints ("LDS") and at LDS religious buildings as a part of the students' mandatory class

requirements. Amended Complaint ("AC") ¶ 16(b); TCA 158.[2]

Torgerson continued to arrange performances at LDS services on a regular basis as instructor of the West High School Choir. AC ¶ 16(e); TCA 159. During the performances, the choir sang Christian religious songs, including LDS hymns. AC ¶ 16(f); TCA 159. Prayers and sacraments were offered at the services, and on at least one occasion, sacrament was passed among the LDS Choir members and over the non-members. AC ¶¶ 16(b), (f), (j); TCA 158-60. During these services, some of the LDS Choir members stood and "bore their testimonies" about the role of Jesus Christ in their life and their belief that the LDS Church is the only true church. AC ¶ 16(f); TCA 159.

In addition to regular choir performances, Torgerson scheduled several out-of-state tours where the choir performed its repertoire of predominantly Christian music at predominantly Christian religious venues. AC ¶¶ 16(f), (l); TCA 159, 161. The year before Bauchman joined the choir, Torgerson conducted a spring concert tour in the Pacific Northwest – the religious purpose of which was unmistakable. To mark the opening of the tour, Torgerson recited a prayer praising Jesus and invoking the assistance of "our heavenly father." AC ¶ 16(k); TCA 160-61. The choir performed primarily at LDS religious sites, with only two of the performances being at non-LDS sites. AC ¶ 16(l); TCA 161. One of the performances was

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[2] Citations to "TCA" refer to the Appendix to Bauchman's appeal No. 96-4101 to the United States Court of Appeals for the Tenth Circuit.

conducted at an LDS "fireside" service where Torgerson presented the choir as an LDS religious choir and where the LDS Choir members "bore their testimonies." AC ¶ 16(m); TCA 161-62. Upon returning from the tour, more than twenty students signed a petition in protest of the religious nature of the tour. AC ¶ 16(n); TCA 162.

Torgerson also made use of regular choir class time to instruct his students in his religious beliefs. AC ¶¶ 16(b), (g), (h), (i), (l); TCA 158-161. Torgerson improperly brought religion into the classroom by commemorating class events with prayer and by instructing the class during rehearsals to understand and believe the religious meaning of the lyrics. AC ¶ 16(k); TCA 160-61, 250, 329, 346, 352. On one occasion while the choir was rehearsing "Lamb of God," Torgerson shut off the lights in the classroom and instructed the students to visualize "Jesus dying for our sins." AC ¶ 16(i); TCA 160.

Torgerson continued these practices during the 1994-95 school year when Bauchman joined the choir. While Bauchman was a member of the choir, Torgerson exhorted students during a class rehearsal to accept the message of the Christian lyrics. TCA 219C, 770-71. On another occasion, following a class performance at a Baptist church, Torgerson offered a prayer of thanks to the "heavenly father." TCA 331, 338. Throughout the year, the choir continued to perform predominantly Christian music predominantly at Christian religious sites, particularly Mormon churches. TCA 219B, 219E, 334-35, 342-43, 672-74.

When Rachel complained of these practices and requested that Torgerson diversify the musical repertoire,

Torgerson retaliated by ostracizing Rachel from her classmates and embarrassing and harassing her during class. Torgerson repeatedly used his class lectures to berate Rachel for her opposition to his practices, emphasizing that as a Jew she should understand how Mormons are persecuted for their religious beliefs. AC ¶¶ 17(i), (j), (k); TCA 167-68. Rather than modify the repertoire and performance locations for the scheduled spring tour to deemphasize its religious focus, Torgerson himself cancelled the official tour and then surreptitiously organized a tour of religious venues which excluded the non-Christian members of the choir. AC ¶¶ 19(f), 17(g); TCA 166, 173.

In a further attempt to arouse sentiment against Rachel, Torgerson gave a letter from Rachel's father complaining of his practices to another choir member's parent to enlist the parents and their children's support in isolating Bauchman. AC ¶ 17(d); TCA 166. As a result of this conduct, Bauchman was ostracized from her classmates and subjected to epithets such as "Jew Bitch" and "Dirty Jew." AC ¶¶ 37, 49; TCA 21, 187, 191, 219F. She was told by her classmates to "go back to Israel," and a Nazi swastika was drawn on one of her posters for class office. *Id.* Fearing continued retribution for her religious views, Rachel decided not to join the choir in the 1995-96 academic year. AC ¶ 37; TCA 187-88.

Throughout his tenure, Torgerson made no effort to keep secret the religious purpose for his method of conducting the choir class. During the 1994-95 school year, Torgerson explained that "I bring religion into the classroom, and I ask my students to do the same." TCA 774. On several previous occasions in response to students'

complaints about his conduct in the choir class, Torgerson told students that he disagreed with Supreme Court law forbidding the advocacy of religion in the classroom and that he intended to continue to do so even though it was illegal. AC ¶¶ 16(h), (n); TCA 160, 162. Torgerson also once explained that he preferred having Mormon students in the choir because it made it easier to perform at LDS services. AC ¶ 16(d); TCA 158-59, 222.

ARGUMENT

I. The Standard of Proof Adopted by the Tenth Circuit Conflicts with the Analysis of Actual Purpose Applied by this Court.

A. Circumstantial and Historical Evidence Are Relevant to an Inquiry into the Government's Purpose Under the Court's Establishment Clause Cases.

This Court's jurisprudence makes clear that "the content of a public school's curriculum may not be based on a *desire* to promote religious beliefs." *County of Allegheny v. American Civil Liberties Union*, 492 U.S. 573, 590 n.40 (1989) (emphasis added). Although the Court generally gives great weight to the government's stated purpose, Establishment Clause jurisprudence requires courts to look behind the stated purpose to determine the government's actual purpose. *See Edwards v. Aguillard*, 482 U.S. 578, 586-87 (1987) ("[I]t is required that the statement of such purpose be sincere and not a sham."); *Stone v. Graham*, 449 U.S. 39, 41 (1980) (per curiam) (Act is unconstitutional when, despite an avowed secular purpose, the "pre-eminent purpose . . . is plainly religious in nature.")

In determining the government's purpose, this Court has never limited its examination to the explicit statements of purpose by legislators or other government actors, as the Tenth Circuit decision now requires courts to do.

Circumstantial and historical evidence have long been essential to the Court's evaluation of the government's actual purpose. In *Epperson v. Arkansas*, 393 U.S. 97 (1968), the Court invalidated an Arkansas statute prohibiting the teaching of creationism in the public schools based on its religious purpose, even though the statute did not explicitly state such a purpose. In evaluating the legislature's actual purpose, the Court looked beyond the contemporaneous statements of legislators to a similar "antecedent" statute which "candidly stated its purpose." *Id.* at 107-108. The Court also relied on circumstantial evidence indicating that "the statute was a product of the upsurge of 'fundamentalist' religious fervor." *Id.* at 98, 106-107.

This Court invalidated another creationism statute without an express statement of its religious purpose in *Edwards v. Aguillard*, 482 U.S. 578 (1987). In *Edwards*, the Court rejected as a "sham" the legislature's stated purpose of furthering "academic freedom" and "fairness" based on circumstantial evidence that its stated purposes could have been achieved more directly without advancing or promoting a particular religious belief. *See id.* at 586-589. Historical evidence of the legislature's intent was also relevant to the inquiry, as the Court determined the purpose of the current statute based on the legislature's purpose in drafting a previous "model" statute. *Id.* at 601 (Powell, J., concurring).

Once again, in *Wallace v. Jaffree*, 472 U.S. 38 (1985), the Court invalidated a statute calling for a moment of silence or prayer because of the statute's religious purpose. In discerning the statute's purpose, the Court did not limit its inquiry to statements by legislators, but rather considered the statute in light of its historical context, by gleaning its purpose from the history of three similar statutes passed at different times. *Id.* at 58, 65.

Indeed, this Court's endorsement analysis emphasizes the importance of context in evaluating whether the government's purpose is to endorse religion.[3] *Lynch v. Donnelly*, 465 U.S. 668, 694 (1983) ("Every government practice must be judged in its unique circumstances to determine whether it constitutes an endorsement of religion.") (O'Connor, J., concurring). "The endorsement test depends on a sensitivity to the unique circumstances and context of a particular challenged practice." *County of Allegheny*, 492 U.S. at 629. Although the Tenth Circuit acknowledged that the endorsement test calls for a consideration of historical context, it refused to consider Torgerson's twenty-year history of classroom advocacy of religion, holding that the endorsement test inquiry into

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[3] Under the endorsement test, the context of a challenged practice is relevant both to the question of effect and intent. As explained by Justice O'Connor: "The meaning of a statement to its audience depends both on the intention of the speaker and on the 'objective' meaning of the statement in the community. Some listeners need not rely solely on the words themselves in discerning intent: *they can discern the intent by*, for example, *examining the context* of the statement." *Lynch*, 465 U.S. at 690 (O'Connor, J., concurring) (emphasis added).

context does not include "every alleged past constitutional violation." 132 F.3d 542, 560 (1997).

The Tenth Circuit's holding that a claimant can prove intent only through an express, contemporaneous statement of religious purpose finds no support in Establishment Clause jurisprudence and, indeed, is in direct conflict with this Court's decisions. Exclusion of all historical, circumstantial and contextual evidence of intent is contrary to the constitutional command that the court determine the actual purpose of a challenged act. More importantly, the Tenth Circuit standard poses nearly insurmountable obstacles to claims by public school students that a teacher is advocating religion in the classroom. The dismissal of Bauchman's complaints, which so clearly present evidence of Torgerson's religious purpose, dramatically illustrates how even the most egregious and long-standing abuses of a teacher's power will go unchecked and, indeed, unreviewed under the Tenth Circuit standard.

B. The Tenth Circuit Improperly Excluded Evidence of Torgerson's Subjective Intent.

In excluding all evidence of Torgerson's intent, the Tenth Circuit incorrectly held that the " 'actual' purpose component of the endorsement analysis . . . is an objective one, removed from any subjective intent Mr. Torgerson may have." 132 F.3d 542, 560 (1997). To the contrary, the endorsement test, expanding upon the purpose and effect prongs of the *Lemon* test, is intended to identify those practices which by virtue of the *subjective intent* of

the government or the *objective effect* of the practice convey a message of government support or disapproval of religion. As explained in *Lynch v. Donnelly*, 465 U.S. 668 (1983):

> The meaning of a statement to its audience depends both on the intention of the speaker and on the 'objective' meaning of the statement in the community . . . Examination of both the *subjective* and objective components of the message communicated by a government action is therefore necessary to determine whether the action carries a forbidden meaning.

Id. at 690 (O'Connor, J., concurring).

The subjective intent of a public school teacher's curriculum decisions is especially relevant in determining whether the teacher has communicated a message of endorsement to students. As recognized by this Court's Establishment Clause cases, public school teachers can affect the thoughts and behavior of impressionable school children. *Wallace v. Jaffree*, 472 U.S. 38, 81 (1985) (When "religious exercises are directed at impressionable children who are required to attend school, . . . government endorsement is much more likely to result in coerced religious beliefs.") (O'Connor, J., concurring). By virtue of their authority and the tendency of students to emulate them, teachers have a unique power to endorse religion in the classroom. *See Edwards v. Aguillard*, 482 U.S. 578, 584 (1987). If courts are to determine whether a public school teacher's conduct or teaching communicates an intention to promote religion, they must consider all evidence of the teacher's subjective intent.

By excluding this probative evidence, the Tenth Circuit standard simply ignores the fact that students at West High School, like Bauchman, were aware of the history of Torgerson's conduct and statements. TCA 21, 219F, 227, 237, 250. A student with knowledge of Torgerson's course of conduct would reasonably perceive that he intended to advocate a belief in Christianity or in religion in general. It is this perspective, that of the student, which the court must examine in understanding whether Torgerson's conduct communicated an intent to promote religion. The court's suggestion that a reasonable observer would not view the conduct as motivated by a religious purpose because of the "historical tension between the government and the Mormon Church" not only discounts the students' unique perspective, but also turns the analysis on its head by suggesting that proselytization in the public schools is legitimate as long as it has been tolerated historically. 132 F.3d at 555.

As illustrated by *Lee v. Weisman*, 505 U.S. 577 (1992), the court must consider the special context of the public schools to understand how students might perceive intent differently than adults. *Id.* at 592 (Religious "exercises in public schools carry a particular risk of indirect coercion."); *see also, Edwards*, 482 U.S. at 585 (court must apply the *Lemon* test, "mindful of the particular concerns that arise in the context of public elementary and secondary schools."). *Lee* recognizes that in the context of the public schools, the dissenter of school age may more readily perceive that the public school intends to promote or endorse religion. *See Lee*, 505 U.S. at 592-94. As stated in *Lee*:

> what to most believers may seem nothing more than a reasonable request that the nonbeliever respect their religious practices, in a school context may appear to the nonbeliever or dissenter to be an attempt to employ the machinery of the State to enforce a religious orthodoxy.

Id. at 592-93.

By excluding all evidence of a school official's subjective intent and ignoring the unique perspective of high school students, the Tenth Circuit's endorsement analysis leaves students without adequate protection from the advocacy of religious beliefs in public classrooms.

II. The Pleading Standard Adopted by the Tenth Circuit Deprives Public School Students Challenging Religious Practices in the Schools of the Ordinary Inferences Made on a Motion to Dismiss.

Liberal federal pleading standards require that on a motion to dismiss the court must construe the allegations in the light most favorable to the plaintiff. *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957). A court ruling on a motion to dismiss under Fed. R. Civ. P. 12(b)(6) must therefore assume the truth of the facts as alleged and draw any reasonable inferences consistent with the allegations. *Neitzke v. Williams*, 490 U.S. 319, 327 (1989); *see Hishon v. King & Spaulding*, 467 U.S. 69, 73 (1984) (motion should be granted only if relief cannot be granted under any set of facts consistent with allegations). Furthermore, when pleading intent, a plaintiff need only plead it generally. Fed. R. Civ. P. 9(b) ("Malice, intent, knowledge, and other conditions of mind of a person may be averred generally.")

The Tenth Circuit declined to apply these well-established rules of pleading in evaluating Bauchman's Amended Complaint and instead improperly weighed the evidence, made inferences and assumptions favorable to defendants, and altogether disregarded evidence presented by Bauchman. Although the court explicitly stated that "the amended complaint contains numerous allegations to support Ms. Bauchman's claim that Mr. Torgerson has unconstitutionally promoted his religious beliefs in the classroom for over twenty years," the court concluded that Bauchman had not pled Torgerson's "religious purpose." 132 F.3d 542, 559 (1997). Rather than draw reasonable inferences of religious purpose suggested by Torgerson's own statements, his harassment and exclusion of Bauchman, and his routine performance of Christian music at Mormon churches, the court drew inferences favorable to the *defendants*, explaining that the court could "discern a number of plausible secular purposes for the defendants' conduct." *Id.* at 554.

By depriving Establishment Clause claimants of the ordinary inferences made on a motion to dismiss, the Tenth Circuit decision effectively requires a plaintiff pleading religious intent to *disprove* secular intent in the *pleadings*. According to this new standard, Establishment Clause plaintiffs must allege that there is "no 'clearly secular purpose' "[4] for the challenged practice and must

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[4] The Tenth Circuit incorrectly held that under the *Lemon* test, a government practice is constitutional as long as there is some secular purpose. To the contrary, the "purpose prong of the *Lemon* test . . . is not satisfied . . . by the mere existence of some secular purpose, however dominated by religious purposes." *Lynch v. Donnelly*, 465 U.S. 668, 690-691 (1984); *see*

also allege facts sufficient to disprove any hypothetical secular purpose. *Id.* at 554, 555. The court found Bauchman's pleading of purpose insufficient to support her Establishment Clause claim because she failed to allege facts showing that (1) Torgerson's repertoire was markedly different from other school choirs, or (2) that the acoustics or seating at the church venues were unsuitable for performance. *Id.* at 555. This standard imposes unprecedented burdens on Establishment Clause plaintiffs by requiring them to anticipate in their pleadings every possible secular purpose imagined by the court.

Although the Tenth Circuit concluded that "the amended complaint clearly asserts defendants' conduct was motivated by a religious purpose," the court adopted the district court's decision which rejected Bauchman's Amended Complaint on the basis that her allegations were "unsupported or at odds with an objective view of evidence developed in discovery." 1996 WL 407856, at *3. The district court decision adopted by the Tenth Circuit improperly engaged in a weighing of the evidence, at times, simply ignoring or dismissing the evidence altogether. Of particular importance is the district court's holding that Bauchman's allegations concerning Torgerson's organization of a covert spring tour and concerning her allegations of his criticism of her during class were "unsupported by [the] evidence produced." *Id.* at *6-*7. Perhaps most importantly, the district court refused to draw any inference of Torgerson's religious purpose from

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also Stone v. Graham, 449 U.S. 39 (1980) (posting of Ten Commandments in school unconstitutional due to its religious purpose, even though the state had some secular objectives).

his admission that he brought religion into the classroom and expected his students to do the same. *Id.* at *4.

In addition to denying Establishment Clause claimants the benefit of favorable inferences at the pleading stage, the Tenth Circuit decision imposes an unprecedented pleading requirement for pleading intent which is inconsistent with the longstanding federal rule, and indeed, with Tenth Circuit precedent, allowing intent to be pled generally. *See Phelps v. Wichita Eagle-Beacon*, 886 F.2d 1262, 1269-1270 (10th Cir. 1989) (to plead racial animus for purposes of an equal protection claim, it is sufficient to make general averments of intent unaccompanied by supporting factual allegations). Under the Tenth Circuit's highly particularized pleading standard, an Establishment Clause plaintiff must plead an explicit, contemporaneous and specific statement of the government actor's religious purpose – a generalized pleading supported by circumstantial evidence is insufficient.

The heightened pleading standards adopted by the Tenth Circuit impose a unique hardship on Establishment Clause claimants. Without an admission of culpability by a government official and allegations which exclude all possible secular purposes, an Establishment Clause claim based on the religious purpose of a government practice will not survive a motion to dismiss. This harsh pleading standard is especially unjust in the context of challenges brought by public school students – a particularly important area of Establishment Clause law. As Bauchman's Amended Complaint illustrates, the Tenth Circuit's restrictive pleading standard deprives claimants who clearly state violations of the Establishment Clause of a fair opportunity to prove their case.

III. The Policy Rationales Presented by the Tenth Circuit to Justify the Heightened Standards of Pleading and Proof Are Contrary to the Constitutional Principle of Strict Enforcement of the Establishment Clause in the Public Schools.

As this Court has noted, "there are heightened concerns with protecting freedom of conscience from subtle coercive pressure in the elementary and secondary public schools." *Lee v. Weisman*, 505 U.S. 577, 592 (1992). Thus, "[t]he Court has been particularly vigilant in monitoring compliance with the Establishment Clause in elementary and secondary schools." *Edwards v. Aguillard*, 482 U.S. 578, 583-84 (1987). This heightened scrutiny is necessary because the system of public education presents a unique opportunity for the state to infringe students' freedom of conscience. "The State exerts great authority and coercive power through mandatory attendance requirements, and because of the students' emulation of teachers as role models and the children's susceptibility to peer pressure." *Id.* at 584. Public schools must, therefore, "maintain a strict and lofty neutrality as to religion." *School District of Abington Township v. Schempp*, 374 U.S. 203, 218 (1963).

The unprecedented pleading and proof standards imposed by the Tenth Circuit turn these constitutional principles on their head, substituting heightened protection of school children for heightened protection of the decisions of school teachers, administrators and school boards. In justifying these heightened standards, the Tenth Circuit states that they are necessary to avoid involving courts in education decisions best left to the states and local school boards. 132 F.3d 542, 561 (1997).

Such a holding is contrary to the very essence of Establishment Clause jurisprudence.

This Court has never exempted public school curriculum decisions or practices from review since these decisions go to the very heart of Establishment Clause concerns in the context of the public schools. This Court's decisions in *Epperson*, *Edwards*, and *Lee* reflect that religious practices and curriculum decisions in the schools are not immune from review, even if they are long-standing practices traditionally left to the authority of school officials. *See Lee*, 505 U.S. 577 (invalidating graduation benediction); *Edwards*, 482 U.S. 578 (invalidating statute requiring simultaneous teaching of evolution and creationism); *Epperson v. Arkansas*, 393 U.S. 97 (1968) (invalidating statute requiring teaching of creationism). That the curriculum decisions in this case were made by a teacher rather than a state legislature or school board in no way minimizes the need for court review of practices which bring religion into the classroom in an impermissible manner. To exclude the classroom conduct of public school teachers from review would be to leave public school students without protection against the decisions which most directly affect their education and over which there is the least public review.

In further support of the heightened pleading and proof standards, the Tenth Circuit states that to hold otherwise would be to subject religious public school teachers to a "unique disability" simply by virtue of their religious beliefs and would make school districts less amenable to hiring openly religious teachers. 132 F.3d at 560-561. Although the case law does support the notion that teachers have free speech and free exercise rights as

employees of the public schools, "even the most cursory reading of the Court's school prayer cases belies any notion that these may trump schoolchildren's Establishment Clause rights." *Doe v. Duncanville Independent School District*, 994 F.2d 160, 166 (5th Cir. 1993).

In any case, allowing challenges like the one presented in Bauchman's Amended Complaint does not threaten to subject public school teachers to a special disability due merely to their religious beliefs. Bauchman's Amended Complaint alleges much more than the mere fact that Torgerson was a religious man or that he selected religious music. The gravamen of her complaint is that Torgerson brought his religion into the classroom in an attempt to advance his beliefs.

The heightened pleading and proof standards adopted by the Tenth Circuit violate the principles of strict enforcement of the Establishment Clause in the public schools by protecting public school teachers at the expense of public school students, thus imposing a *unique disability on public school students* seeking to prove that a public school official has violated the Establishment Clause. *Amici* are concerned that these standards threaten to break down the wall between church and state in the public schools and to undermine our public schools as neutral havens for secular education. As this Court has emphasized, the importance of keeping our nation's public schools free of sectarian strife cannot be understated "if we are not to strangle the free mind at its source and teach youth to discount important principles of our

government as mere platitudes." *West Virginia Bd. of Educ. v. Barnette*, 319 U.S. 624, 637 (1943).

CONCLUSION

Because the decision below conflicts with the Establishment Clause decisions of this Court and with the constitutional principle of careful scrutiny of public school decisions involving religion and because it imposes unwarranted burdens at the pleading stage for Establishment Clause claimants, Bauchman's petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

STATEMENTS OF INTEREST OF INDIVIDUAL *AMICUS*

Unitarian Universalist Association

The Unitarian Universalist Association is a religious association of more than one thousand congregations in the United States, Canada and elsewhere. Through its democratic process, the Association adopts resolutions consistent with its fundamental principles and purposes. In particular, the Association has adopted numerous resolutions affirming the principles of separation of church and state and personal religious freedom. The Association's resolutions include, specifically, statements in opposition to religious practices, observances and indoctrinations in public schools.

Americans for Religious Liberty

The Americans for Religious Liberty, founded in 1981, is a nationwide nonprofit public interest educational organization dedicated to defending religious liberty, freedom of conscience, and the constitutional principle of separation of church and state. ARL has participated as an *amicus* in other cases before this Court that have implicated these concerns.

American Humanist Association

The American Humanist Association, founded in 1941, is an educational, philosophical, and religious organization with members and local affiliates throughout the

United States. The Association has adopted formal statements in support of the principle of church-state separation and the religious neutrality of our common public schools. The Association has participated as an *amicus curiae* in a number of cases before this and other courts.

Council for Secular Humanism

The Council for Secular Humanism is dedicated to furthering the ideals of freedom of conscience, as espoused by Thomas Jefferson, James Madison, and other founding fathers of the United States. We are committed to the First Amendment of the Constitution and the principle of separation of church and state. We represent millions of Americans, who are nonbelievers – agnostics, atheists, and secular humanists. In our view, all citizens of this great country should be afforded the same liberty of conscience – to believe or *not believe* in any orthodox religious tenet or doctrine. The public schools should provide the same protections for all citizens, including Rachel Bauchman. If her rights can be abrogated in the public schools, then who is safe? Hence, we wish to join in this *amicus* brief on her behalf.

Freedom to Learn Network

The Freedom to Learn Network, an all-volunteer grassroots organization that began in 1992 in response to challenges to public education, believes that *all* children have the basic right to educational freedom. The common goal of our diverse membership is to support and maintain public education while striving to improve its quality. As stated in our *Declaration of Principles*, "we believe

in the separation of church and state, and in its obvious corollary, separation of church and public school. Public officials should not seek to promote one set of religious beliefs over others. Religious doctrine should be appropriately taught at home, in church, and in other private religious settings."

American Ethical Union

The American Ethical Union is a federation of Ethical Culture/Ethical Humanist Societies. Ethical Culture began in 1876 with the founding of the New York Society for Ethical Culture. Today there are twenty-two societies in the United States. Ethical Culture is a humanistic religious and educational movement inspired by the ideal that the supreme aim of human life is working to create a more humane society. The American Ethical Union has from time to time together with other religious organizations signed on to *Amicus Curiae* Briefs in support of Separation of Church and State. From the time of its inception, Ethical Culture has consistently supported the Constitutional separation of Church and State.

American Association of University Women

For well over a century, the American Association of University Women (AAUW), an organization of 160,000 members, has been a catalyst for the advancement of women and their transformations of American society. In more than 1,600 communities across the country, AAUW members work to promote education and equity for all women and girls. Current legislative priorities include gender equity in education, reproductive choice, and

workplace and civil rights issues. AAUW affirms the doctrine of separation of church and state.

Americans for Democratic Action

Americans for Democratic Action, Inc. ("ADA") is an independent liberal political organization, founded in 1947, dedicated to promoting individual liberty and economic justice. ADA publishes a weekly legislative newsletter for liberal activists, a quarterly newsletter, special reports, including an annual voting record report that ranks Members of Congress according to a liberal quotient, based on a full spectrum of domestic and international policy issues. In addition to its legislative advocacy, ADA maintains a political action committee to support liberal candidates for Congress. ADA also engages in independent campaign activity in support of presidential candidates.